

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 28 May 2015**

**BALCA Case No.: 2014-PER-00895**  
ETA Case No.: A-13183-77329

*In the Matter of:*

**MONTESSORI WORLD**  
**d/b/a**  
**MONTESSORI VISIONS,**  
*Employer*

*on behalf of*

**MOODLEY, NAMOSHINI,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearance: Abbe Allen Kingston, Esquire  
Kingston, Martinez & Hogan, LLP  
Santa Barbara, California  
*For the Employer*

**DECISION AND ORDER**  
**GRANTING MOTION TO REOPEN**  
**AND**  
**GRANTING MOTION TO**  
**REMAND FOR GRANT OF CERTIFICATION**

**PER CURIAM.** This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at 20 C.F.R. Part 656.

## **BACKGROUND**

On July 2, 2013, the Employer filed a Form 9089 Application for Permanent Employment Certification sponsoring the Alien for permanent employment in the United States for the position of “Curriculum Developer.” (AF 22-32).<sup>1</sup>

The Certifying Officer (“CO”) denied certification on February 28, 2014 on the ground that the Form 9089 did not show that the Alien had a required certification from the Montessori Accreditation Council for Teacher Education. The CO stated that the Form 9089, Section K and Section K-9, require an employer to list all of the foreign worker’s qualifications for the job requirements. (AF 19-21).

The Employer requested reconsideration/review of the denial arguing essentially that the Form 9089 was not designed in a manner for employers to report the kind of certification at issue, citing the Board decisions in *Moreta and Associates, Int.*, 2009-PER-8 (Aug. 6, 2009); *Clariden School*, 2011-PER-2857 (Jan. 30, 2014); and *Blizzard Entertainment, Inc.*, 2012-PER-28 (Feb. 14, 2014). (AF 4-18).

On April 9, 2014, the CO reconsidered, but found that the ground for denial was valid. The CO acknowledged that the Form 9089 had limitations, but cited a Frequently Asked Questions (FAQs) posted on the Office of Foreign Labor Certification’s website that purportedly addressed the issue and specifically advised the public of the need to list any training that qualifies the alien for the position. (AF 1-3). The CO then transmitted an Appeal File to the Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

The Board issued its Notice of Docketing on August 29, 2014. The Notice required that the Employer provide a statement confirming its intention to pursue an appeal before the Board, and set a schedule for the filing of briefs.

The Board received the Employer’s statement of intent to proceed with the appeal on September 11, 2014, and its legal brief on October 14, 2014 requesting a remand for certification.

On March 2, 2015, the Board received from the National CO a supplement to the Appeal File in the form of an email dated July 8, 2014 from the Employer’s attorney to the Atlanta National Processing Center. The email stated: “The company has requested that the pending permanent labor certification **A-13183-77329** be withdrawn. However, the system is not allowing online withdrawal of this case.” (emphasis as in original).

Based on this supplemental filing, the Board issued an Order of Dismissal on March 27, 2015.

On April 16, 2015, the Board received a filing from the Employer entitled “Government Error ‘Section K Case’ Statement Regarding Order of Dismissal.” This filing, although not titled

---

<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

as such, is apparently a motion to reopen the appeal. In this filing, the Employer's attorney provides a timeline with supporting email correspondence that shows that the ANPC never acted on the Employer's July 8, 2014 withdrawal request, but rather only noted that an Appeal File had been sent to BALCA. The email correspondence also shows that on August 1, 2014, the Employer requested that the "DOL" request the case back from BALCA and re-adjudicate it based on information in Minutes from an OFLC Stakeholder Meeting on April 9, 2014 in which DOL is said to have indicated that it is no longer denying cases based on failure to show qualifications in "Section K" of the Form 9089.<sup>2</sup> The Employer's attorney wrote:

**If the Department of Labor had accepted the employer's request to withdraw the case when it was submitted, more than six months ago, the employer would have had the opportunity to timely file the new case it had prepared. If the withdrawal is processed now, the employer's attempts to hire the beneficiary on a permanent basis will be significantly prejudiced. The prior request to withdraw the case was not processed. The employer was given instructions to communicate directly with BALCA, and the employer did communicate to BALCA its intent to proceed with the appeal.**

(Employer's Statement Regarding Order of Dismissal at 3).

On May 26, 2015, the Board received the Employer's "Motion to Reopen and Remand for Certification." The Employer stated that the Board had dismissed the appeal on the sole ground that the Employer had informed the Board that it no longer wishes to proceed with the appeal, but that it had never so informed the Board and had in fact informed BALCA of its intent to proceed and filed a motion requesting remand to the CO. The Employer stated in the motion that it had contacted the CO's attorney, Harry Sheinfeld, Counsel for Litigation, U.S. Department of Labor, Office of the Solicitor, Division of Employment and Training Legal Services, and obtained the CO's agreement to both the motion and to a request that the matter be expedited.

### DISCUSSION

The Board applies Rule 60 of the Federal Rules of Civil Procedure when considering a Motion to Reopen. *See Spring Branch Independent School District, 2012-PER-23* (Sept. 10, 2013) (applying the Federal Rules of Civil Procedure to circumstances not covered by the PERM regulations or the OALJ Rules of Practice and Procedure). Fed. R. Civ. P. 60(b) provides, in pertinent part:

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect....

---

<sup>2</sup> Attached to this filing is copy of a Motion to Remand dated December 12, 2014. Although BALCA is listed on the service sheet accompanying this document, the Board has no record of receipt of such a motion.

In the instant case, it is clear in retrospect that the Board's dismissal of the appeal on March 27, 2015 was based on the Board's mistaken conclusion that the National CO's forwarding of Employer's July 8, 2014 email requesting withdrawal of the application evidenced the Employer's intention not to proceed with the appeal.

Rather the timeline and subsequent email communication provided by the Employer with its filing entitled "Government Error 'Section K Case' Statement Regarding Order of Dismissal" show that the July 8, 2014 email did not constitute the whole story concerning the procedural stance of the appeal. The Employer's actions in filing a statement of intent to proceed with the Board on September 11, 2014, and its legal brief on October 14, 2014, support the Employer's assertion that it had changed its mind about withdrawing the application prior to it being acted on by the CO and that the Employer never affirmatively moved before the Board to withdraw its appeal.

Under these circumstances, and because the CO concurs with the Employer's May 26, 2015 motion to reopen, the Board finds grounds to reopen the appeal under Fed. R. Civ. P. 60(b)(1).

In addition, the CO concurs with the Employer's motion to remand for certification. This result is consistent with prior Board authority concerning the listing of qualifications in Section K of the Form 9089. Accordingly, the motion to remand is granted.

### **ORDER**

Based on the foregoing, **IT IS ORDERED** that

(1) the Board's March 27, 2015 Order of Dismissal is **VACATED** and the appeal **REOPENED**; and

(2) this matter is **REMANDED** with instructions to **GRANT CERTIFICATION**. *See* 20 C.F.R. § 656.27(c)(2).

For the Board:

**STEPHEN R. HENLEY**

Acting Chief Administrative Law Judge

And

Acting Chair of the Board of Alien Labor  
Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting en banc review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.